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No. 295

In the Supreme Court of the United States

OCTOBER TERM, 1968

CLARENCE LOTHRIDGE AND ZORINA BARNETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Lothridge was convicted on one count of unlawfully selling heroin, in violation of 26 U.S.C. 4705(a), and one count of concealing unlawfully imported heroin, in violation of 21 U.S.C. 174. Petitioner Barnett was convicted on four counts charging violations of the above statutes and one count of purchasing heroin other than from the original stamped package, in violation of 26 U.S.C. 4704(a). Because of a prior narcotics conviction, petitioner Lothridge was sentenced to the statutory minimum term of ten years' imprisonment on each count, the sentences to run concurrently. Peti-

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tioner Barnett was sentenced to concurrent terms of five years' imprisonment on each count.

On January 20, 1968, acting on information received by the Federal Bureau of Narcotics and the results of an independent investigation (Tr. 31), a narcotics agent, using an assumed name, telephoned petitioners and inquired whether he could purchase two quarter-ounces of heroin from them. He received an affirmative reply and was given directions to their apartment (Tr. 8–9). When he arrived at their apartment, the agent paid the $300 which petitioner Lothridge requested, and petitioner Barnett handed him a package of heroin which had been prepared for delivery (Tr. 11–12). Lothridge asked the agent what he used to adulterate his narcotics, and advised him to use bitter lactose, because "[i]t gives the junkies a sting" (Tr. 13).

One week later, the agent made another visit to the apartment, when only Barnett was present. The agent told her that his customers had complained that the heroin which he had purchased from them would not dissolve in water (Tr. 18). Petitioner Barnett replied that "[w]e turn it over just like we get it" (Tr. 57), and that they had not had any complaints in the past (Tr. 19). She then inquired whether he wanted to make another purchase at that time (Tr. 19, 57). When the agent replied in the affirmative, she removed a package of heroin from among a supply of packages which were hidden under a pillow and handed it to him. The agent asked her for a reduction in the price of $150 per spoon, but Barnett replied that he was

getting a good price, since she and Lothridge usually sold the heroin at $160 per spoon (Tr. 19).

Petitioners concede (Pet. 6) that the court of appeals correctly affirmed the judgments, since they did not challenge their convictions on counts on which the concurrent sentences could be sustained (Pet. App. A). Thereafter, present counsel were substituted and petitioned for rehearing, raising the errors presented here. The court of appeals denied the petition on the ground that those claims were available on appeal but had not been raised (Pet. App. B).

There is no substance to petitioners' contention that they were denied effective assistance of counsel by the manner in which their retained counsel prosecuted their appeal. The alleged errors which petitioners claim their lawyer negligently failed to raise provide no grounds for reversal of their convictions.

1. At the close of the government's case, the trial court denied petitioners' motion for a judgment of acquittal on the grounds of entrapment (Tr. 83–86). Thereafter, counsel submitted no request for an instruction on entrapment, and did not object when the court failed to instruct on the subject.[1] The circumstances of the two narcotics transactions described above show beyond question that petitioners were in the business of selling narcotics and that the approaches by the agent "merely afford[ed] opportunities or facilities for the commission of the offense."

[1] The only objections to the instructions raised by counsel pertained to the court's reading of the presumptions set forth in 26 U.S.C. 174 and 26 U.S.C. 4705(a). (Tr. 122–123.)

Sorrells v. *United States*, 287 U.S. 435, 441. The court's failure to give an entrapment instruction on its own motion clearly was not plain error. See *Lopez* v. *United States*, 373 U.S. 427, 436.

2. Shortly after the jury retired, it requested a copy of the indictment. The trial judge refused the request and told the jury that he had fully explained the various charges in the indictment. Petitioners did not object to the court's ruling (Tr. 127–128). About an hour later, when the court was trying to ascertain whether the jury intended to deliberate past 5 p.m., the court said that it would reconsider its ruling if the jury had difficulty understanding the charges (Tr. 129). At that time, the only subject on which the jury requested further clarification was the requirement of a finding of a "purchase" under 26 U.S.C. 4704(a), and the court gave further instructions on that issue (Tr. 130–132). It is within the discretion of the trial court to decide whether the jury should be given a copy of the indictment. *Wall* v. *United States*, 384 F. 2d 758, 763 (C.A. 10); *C.I.T. Corporation* v. *United States*, 150 F. 2d 85, 91 (C.A. 9). There is no indication on the facts of this case that the court abused its discretion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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